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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Revision of Rules and Policies for
the Direct Broadcast Service
Docket Nos. IB Docket No. 95-168 and PP Docket No. 93-253

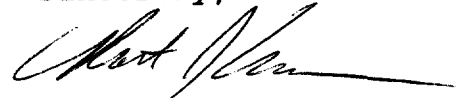
Dear Mr. Caton:

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Transmitted herewith by its attorneys on behalf of the Cable
Telecommunications Association ("CATA"), is an original and four
copies of Comments in the above-referenced proceeding.

If any additional information is desired in connection with
this matter, please contact the undersigned counsel.

Sincerely,



Robert J. Ungar

Enclosure

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Before the
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In the Matter of:

Revision of Rule and Policies for
the Direct Broadcast Service

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) PP Docket No. 93-253

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COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

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) **IB Docket No. 95-168**
) **PP Docket No. 93-253**
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COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

1. The Cable Telecommunications Association ("CATA"), hereby files comments in the above-captioned proceeding. CATA is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 60 million cable television subscribers. CATA files these comments on behalf of its members who will be directly affected by the Commission's action.

Ownership Regulation of DBS systems

2. The Commission's proposed restrictions on DBS systems in which MVPDs have an ownership interest are not based in fact, but rather rooted only in economic conjecture. Data based on experience, the usual fodder for those who regularly ruminate over regulations designed to promote competition, is totally lacking.

3. Even to a newcomer to these shores, the Commission's analysis of "Pro-Competitive Rules and Policies" would seem peculiar. Following a reasoned explanation of its forbearance from establishing restrictions on ownership entanglements between

DBS operators and MVPDs as recently as 1989 in its Continental decision, the Commission then essentially says, "That was then. This is now." By itself, such reasoning will not withstand scrutiny, judicial or otherwise. In 1989, the Commission saw no problem. Surely, there must be more to the Commission's thinking here. There isn't.

In its Continental decision the Commission determined:

The prospect of an increase in the concentration of control of video entertainment sources and outlets which would result from TCI's acquisition of a DBS system through Tempo does not warrant denial or designation for hearing of Tempo's application. To the contrary, in fact, Tempo's participation could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming. As Tempo argues, existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in other video entertainment distribution industries as well.

"Now," the Commission explains, "it makes sense to revisit the extent to which cable operators may hold DBS permits or make use of DBS facilities." Why? Saying it does not make it so. The only thing the Commission has learned between 1989 and now is that there can be effective and robust competition from a DBS system owned by a consortium of cable systems. It would make more sense if the Commission had said that concerns over potential anti-competitive behavior were no longer justified.

4. What is the explanation for the Commissions new-found concern? In the Notice there follows a series of "mays," "mights" and "coulds." Affiliated DBS licensees may not have incentives to compete with other MVPDs. They may have an incentive to minimize competition and coordinate with their other systems to maximize profits. They

might attempt to differentiate their product rather than compete head to head with its other systems.¹ Ownership of DBS channels by an affiliated operator could adversely affect competition. Apparently, sensitive to the possibility that a court is not likely to uphold a Commission decision written entirely in the subjunctive mood, the Commission cites several learned Economics texts.² But scholarship here adds nothing more than support for a theoretical concern. This the Commission had in 1989, and it decided that its concern was not sufficient. So again, what has changed? Nothing.

5. If we may be permitted to forget for a moment the predictions of economic theorists and fix our attention on the real world, we find that Primestar, a DBS system affiliated with major cable operators, has more than 800,000 subscribers and is competing aggressively against all other MVPDs, including cable systems. Primestar's advertising is nationwide and ubiquitous (if not incessant). It seems to have made no attempt to differentiate its programming from that of cable systems. Apparently, Primestar, like other DBS providers seeks subscribers wherever it can find them. Why is this the case? Perhaps because, as the Commission begrudgingly notes:

¹ In other contexts, this would be called diversity of programming. It would be considered to be in the public interest, and would likely win an applicant at least a waiver of the Commission's rules, if not a license. Economic theory is slippery stuff.

² Included is an article entitled, "The Fat Cat Effect, the Puppy Dog Ploy and the Lean and Hungry Look." (By this title the authors must have been attempting to humanize the "dismal science."

They failed.) The article, we are told, is a discussion of how "actions" by firms can be used to signal whether they are likely to compete aggressively or not. If indeed actions speak louder than theory, see the discussion of Primestar's actions below.

...given the presence of other full-CONUS DBS providers, the likely cost structure of the DBS industry, and the imposition of appropriate conduct-related conditions, it may be unlikely that a DBS licensee or operator affiliated with a cable operator or another MVPD would be able to sustain a long-term strategy of avoiding head-to-head competition.

In other words, no company in its right mind will spend hundreds of millions of dollars to build a DBS system and not attempt to effectively compete in the marketplace. This is a case where economic theory has met reality and lost.

6. It is clear that other DBS providers want limitations imposed on cable ownership of DBS systems because they do not want competition. They cloak their anti-competitive rhetoric by stressing the notion that cable owned DBS systems will not compete with cable systems. As we have noted, there is absolutely no evidence for this proposition. Primestar is available everywhere to everyone and has undoubtedly lured away its share of cable subscribers. The Commission, for its part favors competition among all MVPDs. Such competition exists. Under these circumstances, there is no reason whatsoever to impose restrictions on cable owned DBS systems. The proposal to permit such systems the same number of channels as other DBS systems but to prohibit aggregation of channels from different orbital locations is a transparent artifice and, in the final analysis, anti-competitive. This is not what the Commission wants.

HITS

7. Commission proposals with respect to HITS are premature. HITS does not exist yet. All anyone knows is that HITS is an imaginative way to deliver digitally

compressed signals to many cable systems that would not otherwise be able to provide expanded service. Thus, these systems, particularly small systems, might be able to compete against present and future MVPDs. There is no evidence that HITS will in any way be anti-competitive. Moreover, as the Notice suggests, others may wish to provide a similar service. The more the merrier. The Commission should let HITS, from whatever sources, develop and then engage in an inquiry about competition. Should the Commission adopt rules based on its proposals before it has allowed the market to work would constitute regulation for its own sake, a phenomenon we have not seen in many years.³ The Commission should resist any impulse to inject itself into the activities of a new business - particularly at the urging of those whose competitive position would be strengthened.

Conclusion


8. CATA urges the Commission to resist the temptation to begin a new regulatory program. To do so would be premature, and unjustified by what the Commission sees occurring in the real world. It may be understandable that certain DBS providers would prefer to have competitors hobbled by regulation while they are free to pursue profits. This is, unfortunately, as American as apple pie. The Commission,

³ We are mindful of the panoply of pervasive Commission regulation that has smothered the cable industry for three years. While these regulations have, in many respects, been carried to extremes, for the most part, at least, they were dictated by law. They were not a result of the Commission musing about how new businesses should be structured.

hopefully, has the experience and the strength to see through their arguments and stand firm. It should not be the agent of greed.

Respectfully submitted,

THE CABLE TELECOMMUNICATIONS
ASSOCIATION

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